

CHILDREN & FAMILY LAW APPELLATE BULLETIN

Vol. 4, Issue 2

JULY 2001

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APPELLATE PANEL NETWORKING/SUPPORT MEETINGS

We had a large turnout at our most recent Children and Family Law appellate panel support/networking meeting on June 26, 2001 at the Edward Brooke Courthouse in Boston. At that meeting, we discussed methods for appellate counsel to preserve issues for appeal, the issue of children changing position during the course of an appeal, and the Appeals Court's mention in Adoption of Serge of the SJC's Standards on Substance Abuse. We handed out, among other things, portions of these Standards, copies of the 1:28 decision Adoption of Bertrand and its follow-up order regarding the insufficiency of vague "recruitment" adoption plans; sample pages (including the table of contents) of the "Articles Addendum" from Commonwealth v. Frangipane, a case focusing on expert testimony regarding recovered memory; and a working draft of a list of appellate issues that may arise in child welfare appeals. If you are interested in receiving copies of these handouts, please contact Andy Cohen at (617) 988-8310.

We plan to hold other networking/support meetings in the late summer or early fall. If there is sufficient interest, we will hold a meeting in the western part of the commonwealth. Please let us know if you are interested in attending a meeting in your area.

ADVICE FROM THE JUSTICES AT THE 2001 MCLE APPELLATE FORUM

Justices Greaney and Cowin of the Supreme Judicial Court and Justices Lenk and Beck of the Appeals Court spoke at the April 11, 2001 MCLE Appellate Forum. During a panel discussion, they each shared very helpful information about what they look for in briefs, addenda and record appendices as well as in oral argument.

Briefs

The justices were asked by the moderators about their particular "pet peeves" regarding briefs. Justice Lenk expressed her disappointment with briefs that raise important issues on a superficial level but do not provide enough research or legal reasoning to help the court decide the issue. Both she and Justice Beck disfavor briefs that "play fast and loose with the facts"; if a fact is bad, acknowledge it and

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WHOM DO I CALL AT THE CHILDREN & FAMILY LAW PROGRAM?

For assistance with a case:

Please direct any calls regarding strategic, research or informational assistance regarding a *parent* client (whether appellant or appellee) to Staff Attorney Julie Hall at (617) 988-8408 or Co-Director Margaret Winchester at (617) 988-8405. Please direct any such calls regarding a *child* client (again, whether appellant or appellee) to Staff Attorney Andrew Cohen at (617) 988-8310 or Co-Director Susan Dillard at (617) 988-8307.

For assistance with an assignment:

Please call us when you are ready for more work. If you are available for a new Children & Family Law appellate assignment, contact Andrew Cohen at (617) 988-8310. If for any reason you are unable to complete an assignment, or discover a conflict of interest between or among clients, please contact us immediately. We will reassign the case provided this will not prejudice the client.

If you have questions regarding one of your assignments as appellate counsel, contact Rita Caso, Appellate Assignment Coordinator, at (617) 988-8444.

If you have questions regarding malpractice insurance or continuing legal education credits.

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work with it. Briefs, according to both justices, should cite to and address contrary case law and explain why such cases do not apply to the appeal at issue. Justice Greaney urged attorneys to admit when the standard of review is unfavorable, and address the problem squarely.

The justices had several comments that seemed particularly germane to CAFL practice. Justices Beck and Lenk noted that it was frustrating to read briefs that argue about the sufficiency or insufficiency of the evidence to support the trial court's findings but then cite only to the findings rather than to the evidence itself. The findings, they noted, do not support themselves, and do not show whether the trial court paid close attention to the evidence. Justice Beck and Justice Cowin stressed the importance of Mass. R. App. P. 16(e). This Rule provides that citations to the record must be provided for every factual assertion, whether in the Statement of Facts or Argument section. Justice Beck urged attorneys to avoid multiple paragraphs (and, in some instances, pages) of boilerplate standards; the judges, she noted, tend to gloss over such sections. Summaries of the law, citations to standards and burdens of proof should be used judiciously when appropriate in an argument, not simply to open a brief.

Many of the justices said that they begin their review of an appeal by reading the order or findings of the trial court. Others indicated that they read the appellee's brief first. If it is strong, the appellant has an uphill battle; if it is weak, the appellant is given more credence in his or her claims of error. (If justices often read appellee briefs first, this has important implication for child welfare attorneys. It suggests that appellees should flesh out facts and law in their briefs in order to

make them more complete, stand-alone documents. One way to do this is to restate and, if necessary, explain the appellant's argument before attacking it. Another is to include a copy of the findings in the appellee's addendum, even if it is already in the appellant's addendum. In a case where the appellant is challenging certain findings bearing on unfitness, it could be beneficial to provide the court with other evidence of unfitness rather than merely rebutting the appellant's argument by supporting the challenged findings.) For appellants, it also highlights the importance of reply briefs.

The justices also spoke about what they wanted to see more of in briefs. Justice Beck indicated that the opening paragraph of the argument section should set forth why that party -- appellant or appellee -- should win the appeal. Justice Greaney went a step further. He urged attorneys to provide the court with the "big picture" -- that is, an explanation of the consequences to other cases or practice in general of the court ruling one way or the other. Appellees, noted Justice Lenk, should be less defensive of trial court errors; they should concede when the trial court did, in fact, err and argue why any such error was harmless.

Justice Greaney urged attorneys to cite to outside authority, including Restatements, treatises (especially Mass. Practice), law review articles, federal cases and cases from other states. Don't be afraid, he said, to ask the SJC (in both briefs and oral argument) to depart from prior authority, whether that authority is a prior SJC decision or even a United States Supreme Court decision. The SJC, he noted, is willing to depart from

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its own decisions and Supreme Court decisions if the argument is sufficiently convincing.

As to petitions for direct and further appellate review, Justice Greaney urged attorneys not to simply mouth the rules. To convince the necessary number of justices to take the case (two for direct appellate review, three for further appellate review), you must show that the case has broad systemic implications, that the highest courts of other states have addressed the issue, or that there is a conflict among other state courts.

Addendum/Appendix

Justice Greaney reminded the audience that attorneys should put all statutes cited in an addendum at the back of the brief, along with the trial court's findings. See also Mass. R. App. P. 16(a) (6) and 16(f). He also stated that, if there is a crucial piece of evidence at issue, the item should also, if possible, be placed in the addendum. (Although he did not address child welfare appeals specifically, in our cases such a "crucial" piece of evidence might be an adoption plan where the specifics of the plan are in dispute, or a police report when a particular incident forms the basis of an unfitness finding.) Justice Greaney encouraged attorneys to place law review articles, cases from other states, articles from non-legal journals, and any other information to which the justices may not have ready access in a "Supplemental Appendix."

Justice Lenk urged attorneys not to put memoranda of law into a record appendix -- after all, she said, all the law the court needs to review is in the briefs -- unless there is a question which counsel cannot resolve of whether an issue was raised below. All of the justices agreed that the attorneys should review photocopied items in the record appendix to ensure that they are legible. (Although the justices did not discuss what to do with an illegible photocopy when a better one is not available, Justice Perretta has informed us at several CAFL appellate trainings that an illegible exhibit should be accompanied by an agreed-upon transliteration or summary of the contents.)

Oral Argument

All of the justices agreed that questioning from the bench during oral argument was an "opportunity" for the attorney, and should not be viewed as a burden. Questions, according to Justice Lenk, let the attorneys know what is bothering the court and the subjects on which the attorney should focus. The justices also reiterated the need for the attorney to know the record cold as there is no greater aggravation than for an attorney not to know information about the facts and procedural history of the case.

They urged attorneys to think through the likely problems before argument (that is, what are the five problem areas of my case, and how will I respond when the court asks me about them?). They also urged attorneys to know the key cases by heart, and to be current on related law, so that the attorneys are not dumbfounded when the judge asks, "But doesn't the SJC's decision last week in the Johnson case control this issue?"

Justice Cowin suggested that attorneys should open their arguments by telling the court what the key issue is and why they should win. Because the questioning from the bench will start very quickly, she noted, you will not get very long to make your pitch in exactly the way you want, so use the initial minutes well. She also recommended that the attorney condense the argument into "bite-sized chunks" which can be given to the court in the process of answering the questions. When the yellow light goes on, she added, leave the court with your strongest argument. End with a substantive line about your case, stressing a dispositive decision or statute, and tell the court why you should win. Justice Greaney suggested that the attorney have a "two-minute" drill for this time period, when the case is boiled down to a few key points.

Justice Cowin had many useful suggestions for responding to questions from the bench. Never, she said, respond to a question by stating, "I'll go back to that." Answer the question immediately. If you disagree with a statement from the bench, do not get defensive; however, you also need not accept that judge's statement as gospel. Tell the court, with a diplomatic tone, "I respectfully disagree," or "I'm sorry, but I think the facts don't support that conclusion," or "I believe that such and such a case holds otherwise." If the questions strike at the weakest point in your case, don't lose your credibility, she urged. Concede a losing argument voluntarily in order to earn the court's trust on more important issues.

It is not usual, according to Justice Greaney, for attorneys at oral argument to forget names of cases or to refer to the incorrect case. If it will correct a statement the attorney made in court or clarify an argument, the attorney should file a letter with the court under Mass. R. App. P. 16(l). This can also be done if there are new cases on point that are reported after argument but before the decision in your case is issued.

NEW SJC AND APPELLATE RULES

Effective June 1, 2001, the Supreme Judicial Court has amended two rules. First, SJC Rule 2:21(2) ("Appeal from Single Justice Denial of Relief on Interlocutory Ruling") now requires that the appellant file *nine* copies of the record appendix with the Clerk of the Supreme Judicial Court of the Commonwealth fourteen days *after the date on which the appeal is docketed* in the full Supreme Judicial Court. The prior rule required the petitioner to file *eight* copies within fourteen days of the *filing of the notice of appeal*. Second, Rule 27.1(f) of the Massachusetts Rules of Appellate Procedure now provides that "[a]ny party may apply to the Supreme Judicial Court within ten days *after the date of which the appeal is docketed* in the full Supreme Judicial Court for permission to file a separate or supplemental brief." (emphasis added). The prior rule required parties seeking to file a supplemental brief to do so within ten days *of the granting of further appellate review*. The new rule therefore expands the time attorneys have to file additional briefs in the SJC.

FISCAL YEAR 2001 APPELLATE ASSIGNMENTS

During Fiscal Year 2001 (July 1, 2000 to June 30, 2001), the Children and Family Law Program issued approximately 195 new appellate assignments for approximately 90 newly-filed appeals. We also made 16 re-assignments for attorneys who left the practice, had conflicts, or could not accept or continue with the appointment for one reason or another. These numbers are down, but only slightly, from last year. In Fiscal Year 2000 (July 1, 1999 to June 30, 2000), we issued approximately 205 new assignments for 95 appeals with 20 re-assignments.

RECENT CHILD WELFARE DECISIONS

The child welfare cases published during the first half of 2001 are listed below:

Adoption of Arnold, 50 Mass. App. Ct. 734 (2001) (application of Indian Child Welfare Act);

Adoption of Gregory, 434 Mass. 117 (2001) (application of Americans with Disabilities Act);

Adoption of Larry, 434 Mass. 456 (2001) (prior inconsistent statements; sufficiency of the evidence; burden shifting);

Adoption of Serge, 52 Mass. App. Ct. 1 (2001) (substance abuse standards; clear and convincing evidence);

Adoption of Willow, 433 Mass. 636 (2001)

(termination of one parent's rights; adoption plans);

Commonwealth v. O'Neil, 51 Mass. App. Ct. 170 (2001) (ineffective assistance of counsel);

John D. v. Department of Social Services, 51 Mass.

App. Ct. 125 (2001) (sexual abuse within meaning of 110 CMR § 2.00);

Paternity of Cheryl, 434 Mass. 23 (2001) (paternity; relief from judgment; fraud on the court).

Summaries of these and other cases are in the Spring/Summer 2001 CPCS Civil Litigation Newsletter.

SJC STYLE MANUAL

In 1999, the Office of the Reporter of Decisions of the SJC (the "Reporter") issued and made available a style manual to provide guidelines for preparing appellate briefs. The manual sets forth rules of the SJC for writing style, abbreviations and case citations, and provides other practical information. Although the Reporter no longer has copies of the style manual, they are available for copying at the Social Law Library. Or, if you prefer, Staff Attorney Andy Cohen can e-mail you a copy of the manual (NB: the Reporter has eagerly given approval for such e-mail distribution). Andy's e-mail address for requests is: acohen@cpcs1.cpc.state.ma.us.

The manual provides that any citation forms not covered therein must conform to the *Bluebook*. *Bluebooks* (17th edition) may be ordered directly from the publisher at: Attention: Business Office, *Bluebook* Orders, The Harvard Law Review Association, Gannett House, 1511 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-7888. The cost is \$16.00, pre-payment required (by check). *Bluebooks* can be ordered on-line at: www.legalbluebook.com.